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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1107

[redacted],
JEFFERSON THOMAS SUBER,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

(of JEFFERSON T. SUBER)

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

ARLENE MANSON,
JEFFERSON THOMAS SUBER,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA

Petitioner, Jefferson Thomas Suber, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Indiana entered in the above-captioned case on October 2, 1967, petition for rehearing denied on November 13, 1967.

OPINION BELOW

The trial court entered a judgment on the 8th day of August, 1965, printed herein at p. 1a as Appendix A. The Supreme Court of Indiana rendered judgment affirming the trial court and entered an opinion on the 2nd day of October, 1967, which is printed herein at pp. 2a as Appendix B and is reported at 229 N.E. 2d 801; and thereafter on November 13, 1967, the Supreme Court of Indiana denied the Petition For Rehearing of Petitioner Jefferson Thomas Suber, without opinion.

JURISDICTION

The Supreme Court of Indiana entered its opinion affirming the Judgment of the trial court on October 2, 1967. A timely Petition For Rehearing was filed by Petitioner Jefferson Thomas Suber on Monday, Oct. 23, 1967, which petition for rehearing was de-

nied by the Supreme Court of Indiana, without opinion, on November 13, 1967. This Petition for Certiorari is filed within 90 days of that denial, on Monday, February 12, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

The federal questions raised herein are:

1. Whether the judicial determination of probable cause (pursuant to the requirements of the Fourth Amendment to the Constitution of the United States of America) for arrest, search and seizure without a warrant by a police officer can be determined and justified by the State court upon the reliance by that police officer for his actions upon what he is told by radio communication from another police officer, completely without judicial

examination and determination of probable cause in respect to the basis of the radio communication itself -- the nature of the information which caused the sending of the radio communication.

2. Whether a radio communication concerning "two colored subjects", which radio communication was in fact based wholly upon hearsay from a person unknown both to the caller and to the police officer she called and relayed the "information" to, can be judicially considered by the State court as probable cause (within the requirements of the Fourth Amendment to the Constitution of the United States of America) for arrest and immediate search and seizure, as an exception to the rule of law followed by that State court that hearsay cannot form the basis of probable cause.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth and Fourteenth Amendments of the Constitution of the United States of America, to-wit:

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ***

Fourteenth Amendment, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Also Article 1, Section 11 of the Constitution of the State of Indiana, to-wit:

> The right or the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure, shall not be violated ***

STATEMENT OF THE CASE

The petitioners were charged in Kokomo, Howard County, State of Indiana, with grand larceny which was alleged to have occurred on November 23rd, 1962, in that city and county. (R. 52, 11. 1-24)

The petitioners filed a motion to suppress the evidence gained upon the search and seizure which was asserted as unlawful upon the ground that the officer had no probable cause to believe that either defendant had committed any unlawful act and the search of their vehicle was not made incidental to a lawful arrest nor under a warrant. (R. 61-63)

The Court heard evidence prior to trial on the motion to suppress, and overruled the same. (R. 103-155, R. 67, 11. 1-8)

Both on the hearing on the motion to suppress and upon the trial of the cause, the evidence established that the arres-

ting officer, Frank Rose, received a radio call on his police radio that there were two colored persons in a blue Oldsmobile, who were suspected of taking merchandise; and when he found the persons who he thought answered the description he followed them through the Golightly store, into another store, and out into the parking lot, seeing nothing during all of that time to indicate that they had taken any mechandise from any place unlawfully. The radio broadcast was made upon a phone call from Mrs. Donna Umbarger, who was told by an unknown person that there were two subjects they had seen putting something in a car that they(the unknown customer) thought had been taken from Miller's Department Store. (R. 115, 14-24) Mrs. Umbarger then saw the persons at the car described by the unknown customer take a laundry bag out of the car and

put it in the back. (R. 115, 23-29) Mrs. Umbarger herself testified that after she saw this, she telephoned the police, described the car, color of the car, license number, and "I said that we were, that they were suspected of being shoplifters," and she further testified that this was mere suspicion on her part. (R. 117, 11-26)

After their conviction in the trial court, both petitioners duly filed their motions for new trial, contending therein that it was error to admit into evidence over their objections and motion to suppress evidence, the articles of clothing obtained in the search of Suber's automobile, and the testimony of Officer Frank Rose which matter he obtained as a result of the search of said automobile. (R. 68, 69)

In their appeal to the Supreme Court

of Indiana, Petitioners duly filed their assignment of errors, contending error in the overruling of their seperate motions for new trial. (R. 1)

In Appellants' Brief, they contended, with appropriate citations, that the automobile of Suber was subject to constitutional immunity from unreasonable search and seizure; that it was an effect within the meaning of Article 1, Sec. 11. of the Indiana Constitution; that no valid search can be predicated upon an invalid arrest; and that the arrest was unlawful because the information received by the police was mere suspicion and there was no probable cause. (Appellants' Brief, pp. 29-36)

Without any specific argument therefore being advanced by the State of Indiana, Appellee, the Supreme Court of Indiana, in its opinion set out hereinafter at pp.

2a to 8a, APPENDIX B, for the first time in this case injected the theory that it was not necessary, in the judicial determination of probable cause, to look behind the police radio broadcast -- that probable cause should be determined on the basis of necessary reliance by that officer on his headquarters. 229 N.E. 2d 801 That Court stated:

> Obviously in the case before us the police officer, if he were to do his duty promptly, could not be delayed by checking the reliability of the information behind the call over the police radio. He must by necessity rely upon headquarters. A police system, to be effective, must be one in which the members work together, keeping each other informed and relying upon the actions and communications between members. With the use of automobiles in the commission of crime and escape, law enforcement officers are compelled to act with greater speed and less hesitancy than in years past. We find probable cause exists in this case for the arrest and search made by the officer.

This was preceded by the statement by the Supreme Court of Indiana that in determining the existence of probable cause for an arrest or search we need

not go behind the information which a police officer receives upon an alarm over a police radio to him -- that his good faith search cannot be condemned upon information of which he was not aware.

In his petition for rehearing and memorandum submitted therewith Petitioner Suber pointed out that the Indiana Supreme Court was deciding a new question for the first time, without argument thereon in the briefs, and that determination by the Indiana Supreme Court refusing to look behind the police call in the determination of probable cause was in violation of the Fourth Amendment to the Constitution of the United States of America.

ARGUMENT

IN THE JUDICIAL DETERMINATION OF PROBABLE CAUSE FOR THE ACTION IN ARREST AND SEARCH BY POLICE OFFICERS ACTING UPON A RADIO COMMUN-

ICATION FROM ANOTHER POLICE OFFICER OR POLICE HEADQUARTERS, THE KNOWLEDGE OF ONE IS THE KNOWLEDGE OF ALL AND A RADIO COMMUNICATION BASED ON SUSPICION WITHOUT PROBABLE CAUSE CANNOT ITSELF BE CONSIDERED PROBABLE CAUSE FOR ARREST AND SEARCH.

The decision of the Supreme Court of Indiana in regard to the determination of probable cause on the basis of the police radio message to the officer who then made the arrest and search is, it is respectfully submitted, one of the most important and far-reaching decisions in the field of criminal law in many years. The radio message as it related to the "merchandise" was that it "was to be believed had been stolen" (R. 111, 11-16, R. 112, 8-9), and the phone call by Mrs. Umbarger based on her observance of two people moving in the car after an unknown person had told her that there were two subjects seen putting something in a car that they thought had been taken from Millers' Department

Store (R. 115, 14-24, R. 115, 25-29) was, by her own testimony (R. 117, 11-26), based on mere suspicion on her part.

There was obviously no probable cause to support the radio call, and no probable cause to support the arrest and search unless the Court closed it eyes and refused to look behind the radio call to the officer. The impracticability of obtaining a search warrant is not a substitute for probable cause -- they are two different things, and probable cause is absolutely necessary to support the arrest or search. Efficiency in the police department cannot be gained and maintained at the expense of recognized constitutional rights.

If the determination made by the Supreme Court of Indiana is to stand, then the right as against unreasonable search and seizure, and arrest, is no more. All

it takes regardless of the groundless nature of the suspicion of the police department is a radio call to an officer calling upon him to make an arrest or conduct a search as to which subject or the object of which search he has no information other than the radio call. It takes no great imagination to see what a boon this will be to the police departments who have no probable cause but lots of suspicion -- they can manufacture instant probable cause merely with the use of the police radio.

This cannot be the law. It <u>is</u> necessary that the police conclude that the informant was credible and that his or her information is reliable.

Aguilar v. State of Texas, 378 U.S. 108, 84 S. Ct. 1509

United States v. Ventresca, 378 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 684

And a <u>judicial</u> examination of the relia-

bility of the information upon which the police acted is necessary.

McCray v. State of Illinois (1967), ___U.S. ___ 87 S. Ct. 1056

The artificial separation by the Court of the police officers and what they knew is illogical. In regard to the action of one officer based on information received from another, the knowledge of one is the knowledge of all.

Commonwealth of Massachusetts v. McDermott, 347 Mass. 246, 197 N.E. 2d 668

Inherent in the decisions of this Court in Aguilar and Ventresca, supra, as well as Brinegar v. United States (1949), 338 U.S. 160, 69 S. Ct. 1302, is the necessity of judicial determination of probable cause as a basis for the action in arrest and search by the police officers, whether the officer received his information from the statement of suspicion by a third party directly to him, or received the call to

make an arrest from headquarters where the call was based upon a telephone call to headquarters by the third party voicing their suspicion.

The true test is whether the police making the broadcast had reasonable grounds to believe that the offense had been committed and that the defendant had committed it.

Farrow v. State of Maryland (1964), 233 Md. 526, 197 A. 2d 434

The judicial determination must go behind the radio message to the arresting officer, to find probable cause.

THERE APPEARS TO BE NO JUSTIFICATION FOR THE DECISION OF THE SUPREME COURT OF INDIANA AS AGAINST PETITIONERS, SINCE THAT COURT HAS SINCE REAFFIRMED ITS RULE OF LAW THAT HEARSAY WILL NOT SUPPORT PROBABLE CAUSE.

Following the decision in this cause, the Supreme Court of Indiana, on Nov. 30, 1967, in the case of McCurry v.

State of Indiana, 231 N.E. 2d 227, citing the case of Rohlfing v. State (1949), 227 Ind. 619, 88 N.E.2d 148, flatly stated that "The judicial determination of probable cause as required herein must be based on facts and not on hearsay," and further that "The doctrines with reference to hearsay as set out in Rohlfing v. State, supra, still remains the law in Indiana." That Court quoted this Court in the case of Aguilar v. State of Texas (1964), 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723, repeating:

> "...the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identify need not be disclosed *** was credible or his information reliable. Otherwise, the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached magistrate, as the Constitution requires, but instead by a police officer engaged in the often competitive enter-

> prise of ferreting out crime *** or, as in this case, by an unidentified informant.

It sounds like an entirely different Court, and Petitioner Suber respectfully submits that not only has the State of Indiana wholly failed to ensure and protect his rights as against unreasonable search and seizure. but has wholly failed to ensure and protect his right to due process of law, and has denied him the qual protection of the laws.

Fourth and Fourteen Amendments to the Constitution of the United States

CONCLUSION

The decision of the Supreme Court of Indiana is in direct contravention of the Fourth and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, for the foregoing reasons, Petitioner Suber prays that this Court grant a writ of certiorari to review the decision of the Supreme Court of

Indiana.

Respectfully submitted,

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APPENDIX A

JUDGMENT ENTRY OF THE HOWARD CIRCUIT COURT, STATE OF INDIANA, AUG. 8, 1965

In the
Howard Circuit Court, State of Indiana
Cause No. 4709

STATE OF INDIANA

-vs-

JEFFERSON THOMAS SUBER

Winslow, Lester E., Judge

JUDGMENT ENTRY

Comes now said defendant and appears in open court for hearing of said cause. The Court now ask said defendant if he knows of any legal reason why sentence should not be pronounced and defendant answers "No, I don't." The Court now orders said defendant sentenced to the custody of Indiana State Prison, Michigan City, Indiana for a term not less than One (1) year now more than ten (10) years, and is fined $500.00 and costs incurred by this action. The Court now orders said defendant disfranchised for three (3) years.

The Court now orders Recongnizance Bond.

The Court now orders said cause continued pending ruling on Motion for new trial.

APPENDIX B

OPINION OF THE SUPREME COURT OF INDIANA
October 2, 1967

In The
Supreme Court of Indiana
Cause No. 30955

ARLENE MANSON,
JEFFERSON THOMAS SUBER,
Appellants,

-vs-

STATE OF INDIANA,
Appellee.

ARTERBURN, Judge.

The appellants were charged and found guilty of grand larceny and sentenced accordingly. They have appealed. The specifications are that the trial court erred in overruling the motion to suppress evidence obtained in the search of defendant's Suber's automobile. The points presented in the briefs center mainly about this contention.

The evidence shows that officer Frank Rose of the Kokomo police department received a radio message over the police radio system that there were two colored subjects at Maplecrest shopping center and believed to be in Golightly's store, and they were seen in a blue 1960 Oldsmobile with Indianapolis prefix on the license number, and that they had put

some stolen merchandise in the trunk. When officer Rose arrived, he went to Golightly's store at the shopping center and apparently found the two colored persons and followed them as they circled about the store, came out and went into another store known as Grants, made a small purchase and then went to the parking lot to the Oldsmobile described in the radio message. Mr. Suber, the appellant, started his car and the officer then arrested him "for shoplifting."

The officer says that he did not see the appellants do anything which would cause him to believe they were shoplifting, but he did have reason to believe because of the police call that there was stolen merchandise from the shopping center in the trunk of the car. He thereupon searched the car and in the rear trunk found a laundry bag with eight suits on clothes hangers and pants still on clothes hangers, rolled up; also a lady's coat that had a $100.00 price tag thereon. None of the merchandise in the back of the car was wrapped for purchase. The officer stated that appellant Suber said upon inquiry that the merchandise came from the Golightly store.

(1) It is undisputed that a search of a car without warrant after a lawful arrest of the one in possession is not constitutionally interdicted. Carroll v. United States (1925), 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543; 25 I.L.E., Search & Seizure, Sec. 22, p. 422.

(2) Parenthetically, we may say appellant Manson has no standing to ask that the evidence obtained in the search of the

car be suppressed, since she did not own it, and was not in possession or control of it. 25 I.L.E. Search & Seizure, Sec. 5, p.417.

It is argued that there was no probable cause for the police officer to make the arrest and subsequent search based upon the arrest, for the reason that the only information he had was based upon the police radio message to him from the dispatcher at police headquarters. In support of that it is further urged that the radio broadcast made from police headquarters was based solely upon the hearsay of Mrs. Donna Umbarger, who was informed by unnamed persons that the appellants had taken the merchandise from Golightly's.

In determining the existence of probable cause for an arrest or search, must we go behind the information which a police officer receives, which appears to him at the time and under the circumstances to be reliable and from a reliable person, and nevertheless examine the basis of the information and its reliability?

(3) It is the law that the fruits of the search cannot be used to support or justify an illegal search. Idol v. State (1953), 233 Ind. 307, 119 N.E. 2d 428.

(4,5) Likewise, it seems to us that to justify or condemn the good faith search by a police officer upon hindsight information, of which he was not aware, would be illogical. Probable cause justifying an arrest without a warrant exists where facts and circumstances within the arresting officer's knowledge or of which he had reasonably trustworthy information,

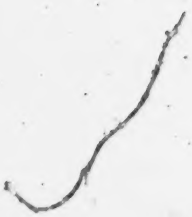
would lead a reasonably prudent person under the conditions at the time to believe a crime had been committed.

The right to arrest without warrant grew out of the need to protect the public safety by making prompt arrests. It had its origin in the ancient "Hue and Cry", upon which all hearing the alarm were bound to join in pursuit of a felon. The "Hue and Cry", repeated by another, would be hearsay.

In this case the arresting officer acted upon an alarm over a police radio to him.

(6) The law looks at the facts and circumstances as they were presented to the police officer who had to make a prompt decision. It is not necessary that the information be direct. Hearsay may at times be sufficient basis for probable cause for arrest or search.

> "The fact that the information received by the arresting officers upon which they began to look for appellant came to them through the medium of an informer who received his information from another, does not render such information incredible. The general rule against the admission of hearsay evidence has never been applied in inquiries into the existence of probable cause. Hanger v. State (1928), 199 Ind. 727, 160 N.E. 449; Gwinn v. State (1929), 201 Ind. 420, 166 N.E. 769, and it manifestly would be impossible to enforce the law if it was necessary to provide the police officers who are sent out to make arrests with direct first-hand knowledge concerning all such mat-



ters." Hinds v. State (1930), 201 Ind. 563, 567, 170 N.E. 539, 540.

(7) Obviously in the case before us the police officer, if he were to do his duty promptly, could not be delayed by checking the reliability of the information behind the call over the police radio. He must by necessity rely upon headquarters. A police system, to be effective, must be one in which the members work together, keeping each other informed and relying upon the actions and communications between members. With the use of automobiles in the commission of crime and escape, law enforcement officers are compelled to act with greater speed and less hesitancy than in years past. We find probable cause exists in this case for the arrest and search made by the officer. Scaffido v. State (1934), 215 Wis. 389, 254 N.W. 651; United States v. Smith (1966) 6 Cir., 357 F. 2d 318; 6 C.J.S. Arrest Sec. 6, p. 600.

(8) It is also urged that the evidence is not sufficient to sustain the finding of guilty. This contention centers mainly upon the argument that there is no evidence that these goods came from the Golightly store at the particular place where the appellants were arrested, since Golightly's had three other stores at other places in Kokomo. However, in our opinion, there is sufficient evidence from which a jury or the court could find that this property came out of the Golightly store at the place where the appellants had parked their car and were found immediately following the radio call. There can be no doubt that this was not purchased merchandise, but stolen merchandise. The tags

were still attached, the suits were still on hangers, and the merchandise was not wrapped in shopping paper. The inventory showed the shortage of goods in this store. There was an empty space on the rack in the store where the suits of this particular size would have been located. There is no evidence that these appellants were in any of the other Golightly stores in other parts of the city. In our opinion, the circumstantial evidence here is sufficient to convince any reasonable person that this property came out of Golightly's store at the place where the appellants were arrested and were discovered with the goods.

Finally, appellant Suber, when he was arrested and asked where the merchandise came from, stated "all the merchandise came from Golightly's Store". From this statement one would conclude he referred to the store at the location where they were talking. The evidence was sufficient in this case.

(9) It is also contended, but we think not too seriously, that the police officer did not make a proper arrest since he stated he was arresting appellants "for shoplifting". It was pointed out that there was no statute making "shoplifting" under that name a crime at that time. To us, this is not important. The importance is they were arrested, and "shoplifting" in our opinion, comprehends larceny in lay language. Certainly larceny was a crime at the time.

The judgment is affirmed.

HUNTER, C.J., and LEWIS and MOTE, JJ.,

concur.

JACKSON, J., concurs in result.

(It is to be noted that upon the denial of the petition for rehearing thereafter, JACKSON, J., dissented.)